No. 867

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JAMES F. BROWNING

In the Supreme Court of the United States

OCTOBER TERM, 1960

RAYMOND H. COMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 23-25) has not yet been reported.

JURISDICTION

The judgment for the court of appeals was entered on March 6, 1961. The petition for a writ of certiorari was filed on April 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for evading, and conspiring to evade, wagering occupational and excise taxes.

STATUTES INVOLVED

26 U.S.C. 4401 provides in pertinent part:

> **(a) Wagers.**
>
> There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> **(c) Persons liable for tax.**
>
> Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. 4411 provides:

> There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

STATEMENT

A two-count indictment returned in the United States District Court for the Eastern District of Kentucky charged petitioner and one John Lang with (1) conspiring, from April through June 1959, to attempt to evade the special occupational tax imposed upon wagering by 26 U.S.C. 4411,[1] and (2) attempting to evade during April 4-30, 1959, the 10% excise tax imposed on wagers by 26 U.S.C. 4401 (R. 3-6).[2] After a jury trial, both men were convicted under both counts (R. 325). Petitioner was sentenced to pay a fine of $2,000 and to serve a term of imprisonment of a year and a day on both counts, the terms to run concurrently (R. 331-332). The court of appeals affirmed.

The evidence is undisputed that, from January 1959 until the date of a raid by Internal Revenue Agents on May 14, 1959, there was in operation, in an upstairs room of a bar and grill owned by petitioner, a "handbook"—a business of accepting wagers on horse races. The main entrance to the gaming room

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[1] Overt acts alleged that defendants (1) carried on a handbook operation in a room behind a locked door in which there was a one-way glass; (2) destroyed daily wagering records by burning; (3) received and accepted wagers on horse races; (4) maintained telephones listed in the name of "Raymond Kanter"; (5) maintained a large supply of "run-down sheets," "scratch sheets" and racing forms; and (6) possessed a loudspeaker which announced race information.

[2] "R." refer to the transcript of proceedings in the district court.

was through a door, kept locked, and equipped with a buzzer and a one-way mirror which permitted a person inside the room to observe anyone seeking admittance without being observed by him. (R. 30-32, 38-39). Among the gambling paraphernalia and equipment in the gaming room, was a loudspeaker or race wire system for announcing immediate race results, and a centrally regulated Western Union clock for precise timing, which is an important factor in the placing of race bets (R. 84, 214). Adjoining the gaming room, and reached only by passage through that room, were the living quarters of petitioner (R. 62).

Petitioner owned most of the furnishings and equipment in the gaming room, including a television set and a radio (R. 124). He also had arranged for and had rented the Western Union clock (R. 104, 183), and had installed the one-way glass in the entrance door (R. 248). In addition, the first telephone used in the gaming room had initially been listed in petitioner's name (R. 130, 211).

On three of the nine occasions prior to the raid upon which a federal agent had secured admittance to the gaming room to place a bet with Lang, the agent had seen petitioner mingling with and talking to the patrons (R. 35). On one of these occasions, when a difference arose between the agent and Lang as to how a bet had been placed, petitioner, at Lang's request, produced the records needed to settle the question (R. 35-36, 74-76). Petitioner also had insisted upon burning the gaming records, *i.e.*, "scratch

sheets," "finger sheets," "writer's sheets," racing forms, etc. (R. 172-174).

Among the keys found on petitioner's person at the time of his arrest on the day of the raid was one to a cabinet under the betting counter in the gaming room (R. 59). In his living quarters, officers found racing forms, "finger sheets," "writer's sheets" and a cash box containing $1,180.00 (R. 52, 116-118). Only $3.91 was found in the gaming room (R. 61). Among the telephone calls received by the raiding officers was one from a woman who said that Mr. Comer had told her she might make a bet on credit (R. 190).

Both petitioner and Lang testified that petitioner had no interest in the "handbook" but had merely leased the gaming room to Lang (R. 201, 235-236); that there had been a prior lease of the same premises for the same purpose by petitioner to Lang in 1958 which had culminated in a raid and the arrest of Lang (R. 202-203, 235-236, 249-250). They also testified that, although during this former period federal income tax reports had listed Lang as an employee of petitioner, Lang had not actually worked for petitioner and the supposed employment relationship had merely been an arrangement whereby Lang could list a proper source of income and pay his income tax (R. 205, 250).

There was also proof that neither Lang nor petitioner had purchased the $50 occupational tax stamp (R. 27). Lang had admitted that he had not paid the excise tax because it had been "impossible" for him to pay it (R. 195-200).

ARGUMENT

The sole issue in the present case is whether petitioner participated as a principal in the gaming business, admittedly conducted on his premises with his knowledge, for which federal taxes had not been paid. As the court below properly held, the circumstantial evidence here was strong enough to have convinced the jury of petitioner's guilt beyond a reasonable doubt. See *Holland* v. *United States*, 348 U.S. 121, 139-140. The issue is clearly not one for review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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